In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1411

LOUIS EDWARD JENNINGS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner challenges the Selective Service Board's selection of his civilian work assignment, to be performed in lieu of military service, and also contests the constitutionality of peace-time work orders.

After a jury-waived trial in the United States District Court for the District of Arizona, petitioner was convicted of having failed to report for civilian work in violation of 50 U.S.C. App. 462(a). He was sentenced to two years' imprisonment. The court of appeals affirmed (Pet. App. A).

The facts are set out in the opinion below. Briefly, they show that petitioner, after having successfully obtained conscientious objector status, received SSS Form 152 which provided him with an opportunity to

list the types of alternative civilian work he desired or considered himself qualified to perform. Petitioner failed to return the form and another was sent by certified mail. When the second form was not returned, the local board, pursuant to 32 C.F.R. 1660.20(b), sent petitioner a letter offering him three choices of civilian work, all located within his state of registration. He returned the letter refusing to accept any of the choices and requesting an alternate list. Thereafter, the local board, acting under 32 C.F.R. 1660.20(c), requested petitioner to attend an interview with a representative of the State Director of the Selective Service System. Upon petitioner's failure to report for the interview, it was determined that he should work at the Arizona Children's Colony, a work choice offered on the original list. When petitioner's registration number was reached for induction, the National Director authorized the work order and ordered him to appear before the local board for assignment to the Children's Colony. When he failed to report, petitioner was indicted.

After several trial dates had been scheduled, petitioner's trial was postponed on the condition that he work in a health care institution for twenty-four months. Petitioner obtained employment as a hospital nursing assistant and was reclassified IV-F. He thereafter quit the job, and his trial and conviction followed.

1. Petitioner contends that the board failed to consider his choice for alternative civilian work. Petitioner refers to two letters sent by officials of a religious organization to his local draft board in April 1968 in support of his original application for conscientious objector status. The letters stated that the organization was prepared to offer petitioner work for two years in fulfillment of his alternate service obligation (Pet. 6-10). Petitioner

was not actually classified as a conscientious objector, however, until February 1970 (Pet. App. A, p. 1).[1] At no time after his reclassification did petitioner refer the local board to the earlier letters or in any other way request assignment to particular civilian work, although he was given full opportunity to do so. It was not until the appeal from his conviction that petitioner asserted that he had been denied his proper choice of civilian work. Having failed to avail himself of the existing administrative remedies for contesting his work assignment, he is foreclosed from raising that defense here. See *McGee* v. *United States*, 402 U.S. 479; *Lockhart* v. *United States*, 420 F. 2d 1143 (C.A. 9); see also *Daniels* v. *United States*, 404 F. 2d 1049 (C.A. 9).

2. Petitioner's claim that the Selective Service System failed to provide assistance is unfounded. Petitioner's local board and the United States Attorney's Office were fully cooperative. Petitioner's trial was postponed three times to afford him the opportunity to find suitable employment. Moreover, he was allowed to obtain a job as a nursing assistant in fulfillment of the work requirement in lieu of prosecution. Only after he left this job was he finally brought to trial (Pet. App. A, pp. 2-3).

3. Petitioner also asserts that the board's order for alternative civilian work was punitive. But Congress provided alternative service for those who in conscience could not participate in war as an accommodation to their beliefs, not as punishment for being conscientious objectors. In assigning petitioner to two years' civilian

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[1] Petitioner's original claim for conscientious objector status was rejected. After the United States Attorney refused to prosecute petitioner for his subsequent refusal to submit to induction, petitioner was reclassified as a conscientious objector (Pet. App. A, p. 1).

work,[1] the Selective Service System deferred to his personal convictions and chose for him an alternative way in which he could serve his country for two years. There is nothing in the Due Process Clause to suggest that he should be relieved entirely of that obligation. Conscientious objector status provides an exemption from military service. Because of its unique nature, the special treatment Congress has determined should be accorded to persons placed in Class I-O is a reasonable one. See generally *United States* v. *Holmes*, 387 F. 2d 781, 785 (C.A. 7), certiorari denied, 391 U.S. 936; cf. *Atherton* v. *United States*, 176 F. 2d 835 (C.A. 9).

4. Finally, petitioner's claim that civilian work orders are unconstitutional does not warrant review by this Court, since similar contentions have been repeatedly rejected by the Court in the past, and there is no conflict on the point among the lower federal courts. As stated in our opposition in *Dinnell* v. *United States*, No. 72-5930, certiorari denied, March 5, 1973, there is no constitutional infirmity in assignment to peace time work.[2] See also *United States* v. *Campbell*, 439 F. 2d 1087 (C.A. 9); *United States* v. *Boardman*, 419 F. 2d 110 (C.A. 1), certiorari denied, 397 U.S. 991; *Loewing* v. *United States*, 392 F. 2d 218 (C.A. 10), certiorari denied, 393 U.S. 878; *O'Moore* v. *United States*, 370 F. 2d 916 (C.A. 5); *United States* v. *Anderson*, 467 F. 2d 210 (C.A. 9), certiorari denied, No. 72-5978, March 19, 1973.

We note further that petitioner's attack on the validity of *United States* v. *Boardman, supra*, is unfounded. He claims that the First Circuit there misconstrued *Sherbert* v. *Verner*, 374 U.S. 398. In our view, however,

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[2] A copy of our memorandum in opposition in *Dinnell* is being furnished to petitioner's counsel.

the *Boardman* court properly distinguished *Sherbert*, which held that state action denying unemployment compensation to one who refused to work on a religious holiday was a denial of the First Amendment freedom of religion. As *Boardman* explained, that situation was quite different from this type of case where, in return for exempting conscientious objectors from military service, Congress required the performance of civilian work. See 419 F. 2d at 113. Unlike the condemned state action in *Sherbert*, the requirement of civilian work in no way "penalizes the free exercise of [petitioner's] constitutional liberties." 374 U.S. at 406. To the contrary, civilian work orders are themselves a manifestation of the government's deference to those whose religious and moral beliefs prevent them from engaging in military service.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1973.